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August 12, 1997

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C.

Re: Reply Comments of Aeronautical Radio, Inc., IB Docket No. 97-142

Dear Mr. Caton:

Pursuant to Section 1.419 of the Commission's Rules, enclosed please find an original and nine copies of the Reply Comments of Aeronautical Radio, Inc. in the above-referenced proceeding.

Should you have any questions regarding this filing, please do not hesitate to contact me.

Sincerely,

Vipul N. Nishawala

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies on Foreign Participation	)	IB Docket No. 97-142
in the U.S. Telecommunications Market	)	

REPLY COMMENTS

OF

AERONAUTICAL RADIO, INC.

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August 12, 1997

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REPLY COMMENTS OF AERONAUTICAL RADIO, INC.

INTRODUCTION AND SUMMARY

In its opening Comments, Aeronautical Radio, Inc. ("ARINC") supported the FCC's conclusion that it did not have sufficient experience with possible foreign ownership of aeronautical enroute licenses, authorized under Part 87 of the Rules, to establish a presumption favoring or opposing a blanket waiver of the limitations of Section 310(b)(4) of the Communications Act. ARINC concurred with the Commission's proposal to continue its current *ad hoc* approach. The only other party to comment at any length on this eminently reasonable policy is Société Internationale de Télécommunications Aéronautiques ("SITA"), a European-based company that provides a VHF air-ground data communications service ("AIRCOM") in a number of countries of the world that is technically compatible with—indeed, derivative of—ARINC's ACARS service.[1]

In its Comments, SITA does not respond to the basic issue of this rulemaking—what the appropriate policies are to meet the United States' obligations to the World Trade Organization ("WTO") to open domestic markets to commercial telecommunications operators of other WTO nations. Rather, SITA seeks to expand this rulemaking into remaking of the FCC's policies regarding domestic frequency management of spectrum reserved for non-commercial operational

[1] On August 1, 1997, the European Union submitted informal Comments that also objected to the FCC's *ad hoc* approach to licensing of aeronautical communications.

control communications for the safety of life and property in the air. The FCC should disregard SITA's irrelevant attempt to undo the FCC's long-standing and successful mechanism for aeronautical frequency management. As shall be shown:

- Contrary to SITA's unsupported assertion, aeronautical enroute communications do not fall within the ambit of the GBT Agreement because they are not "basic telecommunications services." In fact, aeronautical enroute services are designed to ensure the safety and regularity of flight and thus are both non-commercial and enhanced. Either classification places them outside of the purview of the GBT Agreement and the WTO regime.

- Even if aeronautical services were subject to the WTO, the FCC's current Rules and policies are consistent with the U.S. obligations to the WTO. First, current FCC policies afford the fundamental protections of the General Agreement on Trade in Services ("GATS"): they comply with "most favored nation" and "national treatment" obligations. Second, the Reference Paper on Procompetitive Regulatory Principles (the "Reference Paper") signed by the U.S. and many other countries—which was one of the principal innovations of the GBT—accords the United States flexibility in addressing legitimate, transparent, and non-discriminatory issues of frequency management.

- Finally, the Commission's Rules regarding aeronautical enroute service meet all the objectives of the GBT and of free trade in general. In fact, the FCC's policies were designed to ensure non-discriminatory, cost-based, and transparent access to aeronautical enroute facilities for *all* aircraft operators, U.S. and foreign. The Commission's policies are the only method to ensure that all aircraft can utilize aeronautical enroute communications on a transparent, fair and equitably shared basis given the limited frequencies available. The Commission's existing Rules and policies thus promote the objective of free trade and access to necessary coummunications facilities by foreign aircraft operators.

- As a result, the FCC should retain its current policies toward aeronautical enroute licensing and continue its *ad hoc* approach to assessing the public interest in indirect foreign ownership of aeronautical enroute licenses.

I. AERONAUTICAL ENROUTE COMMUNICATIONS ARE NON-PUBLIC, NON-COMMERCIAL, SAFETY OF LIFE COMMUNICATIONS AND ARE NOT "BASIC TELECOMMUNICATIONS SERVICES" WITHIN THE PURVIEW OF THE WTO

In its Comments, SITA asserts that the GBT agreement requires (i) the opening of aeronautical enroute stations to any licensee; and (ii) the grant of aeronautical enroute licenses to SITA, a Belgian entity, in particular. Neither is true, because SITA is mistaken in its claim that the GBT applies to aeronautical enroute services.[2]

Aeronautical enroute services are communications between an aircraft operating agency's ground-based facilities and its flight crew on board an aircraft. Communications to third parties such as aircraft manufacturers, ground support organizations, and air traffic control administrations are also established when the communications relate directly to the safety and regularity of the specific flight. The communications are neither public nor basic and are covered by the safety and national security exemptions in the GATS. Accordingly, the GBT Agreement does not, and was not intended to, apply to aeronautical enroute services.

A. Aeronautical Enroute Services Are Not "Public"

The WTO specifically excluded from the scope of the Group on Basic Telecommunications negotiations and its subsequent GBT Agreement telecommunications that

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[2] The Comments of the European Union also suggest that "aeronautical communications" are covered by the WTO, but do not question the FCC's spectrum management of this service. EU Comments, ¶ 17. As discussed below, the FCC's policies promote the interests of the EU in free trade and access to equal facilities in the United States by European aircraft operators. The EU Comments do not attempt to explain why non-public, non-commercial, enhanced, safety-of-life facilities would be covered by the WTO in the face of the express exclusions in the Agreement discussed below. Because of the non-commercial nature of these facilities and their importance to aviation safety, access to these facilities has always been handled among the world's aircraft operators and aviation authorities on the basis of comity and goodwill—the precise regime to which ARINC and the FCC remain committed. The fact that the WTO does not apply does not mean that all *bona fide* requirements will not now be met. The FCC, through ARINC, has for decades ensured that foreign aircraft operators have access to aeronautical enroute and other radio facilities and services in the United States on the same basis as U.S. airlines.

are not made available to the public generally. The WTO has always used the term "basic telecommunications services" to mean only those services that are offered to the public at large. The multinational organization adopted this understanding of the term in the Telecommunications Annex (the "Annex") of its GATS, promulgated in 1994 (two and one-half years before the GBT was concluded). The Annex provided the framework for the GBT's negotiations that were concluded in February of this year.

In the Annex, the WTO defined those telecommunications services that would be subject to the organization's global free trade rules. The WTO stated that the Annex "shall apply to all measures of a Member that affect access to and use of *public* telecommunications transport networks and services."[3] A "public telecommunications transport service" is thereafter defined as "any telecommunications transport service required, explicitly or in effect, by a Member *to be offered to the public generally*."[4]

Subsequent WTO pronouncements confirm that "basic telecommunications services" are public in nature. In adopting the Final Act, the WTO also made a number of Ministerial Decisions relating to the GATS, one of which outlined what was to be the scope of the organization's telecommunications negotiations. It states that "the negotiations shall be comprehensive in scope, with no basic telecommunications excluded *a priori*."[5] After the GBT concluded its negotiations this February, however, the WTO issued an informal background paper on its telecommunications talks that explains that "[t]he Annex is composed of seven sections, but its core obligations are contained in a section on access to and use of 'public

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[3] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments—Results of the Uruguay Round, General Agreement on Trade in Services, Annex on Telecommunications, § 2(a) (1994) (emphasis added) [hereinafter Final Act].

[4] *Id.* § 3(b) (emphasis added).

[5] Final Act, Decision on Negotiations on Basic Telecommunications, § 2.

telecommunications transport networks and services' (*meaning essentially basic public telecommunications*)."[6]

Under more than 60 years of precedent, the Commission has recognized and treated aeronautical services as not being available to the public at large. Aeronautical communications extend *only* between aircraft operators and their flight crews or aircraft systems, and therefore are available only to a narrow group of eligible users for restricted, safety-related purposes. Moreover, the aeronautical enroute service is a private shared service available to aircraft operators that make prior cooperative arrangements for use of the facilities.[7] Thus, under the long-standing regulatory distinction between "common carrier services"—which were required to be available to the public—and "private radio services"—which were not—aeronautical enroute services have always been classified as private.[8]

Even after the statutory change that created the "commercial mobile radio service" ("CMRS") category, the agency's view did not waver. For example, in its recent classification of CMRS, the Commission stated:

> [I]n the case of existing eligibility classifications under our Rules, service is *not* "effectively available to a substantial portion of the public" if it . . . is offered only to a significantly restricted class of eligible users, as in the following services: . . . (7) Aviation Service Stations.[9]

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[6] WTO, *The WTO Negotiations on Basic Telecommunications*, at 6 (Mar. 6, 1997) (emphasis added).

[7] *See* 47 C.F.R. § 87.261(b). An aeronautical enroute station provides communications without prior arrangement only in case of emergency or distress. *Id.*

[8] This requirement for prior, individually negotiated, stable, contractual arrangements is also a basis for the consistent finding that the aeronautical enroute service is not a common carrier offering. *Cf. National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 643 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

[9] *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, GN Docket No. 93-252, ¶ 67 (Mar. 4, 1994) (footnotes omitted) (emphasis in original) [hereinafter *CMRS Order*].

Indeed, only communications that support airline and other aircraft operations may be sent over the aeronautical frequencies. In defining the permissible scope of service aeronautical enroute stations may provide, the FCC's Rules and the Radio Regulations of the International Telecommunication Union expressly bar public correspondence from the frequencies allocated to the aeronautical enroute service.[10]

It is precisely because of its role in promoting aircraft safety that ARINC's aeronautical enroute service is not a public telecommunications service. ARINC has been designated by the Commission to perform these safety functions since 1929. This service also plays an important role in maintaining national security. By contrast, none of the Agreement's "basic telecommunications services" is designed primarily to safeguard human life, protect property, or advance national security interests.

Contrary to SITA's basic premise, neither the GBT nor this proceeding covers non-commercial, safety-related radio services like the aeronautical enroute service.[11] Thus, the U.S. obligations under the GBT Agreement and the FCC's objective in the instant proceeding do not

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[10] 47 C.F.R. § 87.261(a); ITU Radio Reg. 3633.

[11] SITA never demonstrates exactly how aeronautical enroute services are "basic telecommunications services." Rather, SITA argues that aeronautical enroute services must be subject to the Agreement because the WTO's free-trade rules should apply to three common carrier or commercial mobile radio services: specialized mobile radio, automated maritime telephone service, and public coast service. *See, e.g.,* SITA Comments, at 8. These three commercial services do not support SITA; rather, they underscore the distinction between private non-commercial services, which are not "basic" services, and common carrier or commercial services, which are. Of the three mobile services cited by SITA, the two marine services are now, and have always been, common carrier services that must be made available to the general public and have been regulated by the FCC as such. *See, e.g., CMRS Order*, ¶ 83 (confirming that public coast stations are common carriers and therefore commercial mobile radio services). SMRS is a private carrier service, but Congress directed that it be treated as a commercial mobile radio service to the extent that it operates like a common carrier, *e.g.,* that it is interconnected, provided for profit, and available to the public at large. *See* 47 U.S.C. § 332(d); *see also CMRS Order*, ¶ 90. SITA's comparison of aeronautical services to these common carrier services thus emphasizes that the aeronautical enroute service is different and thus is not a "basic telecommunications service" covered by the GBT Agreement.

address the services discussed by SITA. The United States can be confident that it is meeting its international obligations in this matter without addressing SITA's claims. In any event, as discussed in Section III below, any foreign-owned aircraft operator can have access to United States' aeronautical enroute facilities under a wide variety of arrangements.

B. Aeronautical Enroute Services Are Not "Basic"

By its very nomenclature, the Group on *Basic* Telecommunications Agreement does not cover services other than "basic" telecommunications services. In particular, it does not cover "enhanced" services as that term was defined by *Computer II* and *Computer III*: a service where the supplier adds value through protocol changes or through the interaction with stored information.[12] Indeed, in remarkably the same language as adopted by the FCC, the WTO Telecommunications Annex expressly excludes from its definition of a "public telecommunications transport service" services that involve "any end-to-end change in the form or content of the customer's information."[13] Moreover, a WTO news release describing the GBT Agreement states: "Value-added services (or telecommunications for which suppliers 'add value' to the customer's information by enhancing its form or content or by providing for its storage and retrieval) *were not formally part of these negotiations*."[14]

Aeronautical enroute data services, such as SITA's AIRCOM and ARINC's ACARS, are enhanced. The transmission of data between an aircraft and ground-based systems for air traffic services and aeronautical operational control involves code, speed, and protocol, and format

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[12] *See* 47 C.F.R. § 64.702.

[13] Final Act, Annex on Telecommunications, § 3(b).

[14] WTO, *Ruggiero Congratulates Governments on Landmark Telecommunications Agreement*, News Release, at 2 (Feb. 17, 1997) (emphasis added).

conversion in the networks.[15] The requirements for safety and efficient use of the spectrum also dictate that the systems involve sophisticated frequency management and message accountability features. Given the highly specialized information that they convey, these aeronautical datalink systems are by any definition enhanced services. As such, they are not basic telecommunications and not covered by the GBT Agreement.

C. Aeronautical Enroute Services Are Exempt Because They Promote the Safety of Life and Property in the Air

The aeronautical enroute service also is outside the GBT Agreement because its primary purpose is to ensure the safety of aircraft flight. The aeronautical mobile (R) service, of which the aeronautical enroute service is a U.S. suballocation, is "reserved for communications relating to safety and regularity of flight . . . along national or international civil air routes."[16] Detailed procedures, including message priorities, for use of these frequencies are set down in the Standards and Recommended Practices ("SARPs") of the International Civil Aviation Organization ("ICAO").[17] In the United States, the aeronautical enroute service is also used by scheduled air carriers to meet the safety requirement of the Federal Aviation Administration ("FAA") that U.S. airlines have reliable enroute communications with aircraft in flight over private facilities independent of government operated systems.[18] Without access to aeronautical enroute communications, a U.S. airline cannot operate.

The WTO gives its Member countries wide latitude to determine exceptions to their commitments in order to promote safety. Specifically, the GATS states:

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[15] These systems are designed to meet the requirements of ARINC Characteristic 620, which itself sets forth standards for the ground operation of the datalink and ARINC Characteristics 597, 724, and 724B, which define the airborne portion of the system.

[16] ITU Radio Reg. 3630.

[17] *See* Convention on Int'l Civil Aviation, Annex 10, vol. II, ch. 5 (5th ed. 1995).

[18] *See* 14 C.F.R. § 121.99.

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . . *necessary to protect human . . . health*; [or] necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement *including those relating to . . . safety.*[19]

In this respect, the Commission's Rules make clear that aeronautical enroute communications must be limited to the "safe, efficient, and economical operation of aircraft."[20] Accordingly, the FCC is not required by the WTO to modify its present approach to frequency management for this service.

D. Aeronautical Enroute Services Are Exempt Because They Are Critical to National Security

The GBT Agreement also does not apply to the aeronautical enroute service because the service is an important part of the domestic air navigation system with attendant national security implications. The Commission properly recognized the safety and national security aspects of this service when it tentatively decided to continue the current ad hoc approach to alien ownership of licensees.[21] For example, the aeronautical enroute service supports U.S. airline participation in the Civil Reserve Air Fleet, whereby airlines make aircraft available for Department of Defense operations during national emergencies. The GATS provides an

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[19] Final Act, GATS, Art. XIV §§ (b) & (c)(iii) (emphases added).

[20] 47 C.F.R. § 87.261(a).

[21] NPRM, ¶70.

exception to the coverage of its service code for services used in support of national security.[22] Aeronautical enroute service clearly applies and should be exempted.

II. EVEN IF AERONAUTICAL ENROUTE SERVICE WERE SUBJECT TO THE WTO, THE FCC's CURRENT RULES AND POLICIES ARE CONSISTENT WITH THE U.S. OBLIGATIONS

Even assuming *arguendo* that air-ground communications services should be treated as "basic telecommunications services," the Commission should conclude that the present U.S. policy on aeronautical enroute licensing is nonetheless consistent with the United States' commitments under the GBT Agreement. This is true for two reasons. First, the current FCC Rules and policies afford both national treatment ("NT") and most favored nation ("MFN") status to potential licensees. Second, the United States' policy stems from the critical need to manage efficiently the scarce frequencies available for the service. Such considerations are specifically exempted from the U.S. commitment contained in the Regulatory Reference Paper.

A. The FCC's Licensing Policies as to the Aeronautical Enroute Service Are Consistent with National Treatment and Most Favored Nation

Simply put, neither the Commission's single-licensee per location policy nor its *ad hoc* approach to aeronautical enroute licensing violates the fundamental commitments of GBT signatories: the "most favored nation" and "national treatment" principles. SITA itself acknowledges that this rule "appears to discriminate equally against potential foreign and domestic service providers."[23]

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[22] Final Act, GATS, Art. XIV bis, § 1(a)(i) ("Nothing in this Agreement shall be construed to prevent any Member from taking *any action which it considers necessary for the protection of its essential security interests* relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment.") (emphasis added).

[23] SITA Comments, at 17.

At present, the U.S. treats potential users from each foreign nation alike: they are permitted to obtain service through the U.S. licensee. Thus, the U.S. policy treats all aircraft operators and other users alike and is thus consistent with the most favored nation principle. This policy has ensured the availability of these safety facilities to any foreign or domestic aircraft operator requiring them in support of air commerce.

Similarly, U.S. policy does not violate the national treatment requirement. Under the U.S. law, domestic entities seeking aeronautical enroute license are treated *exactly* the same as foreign entities. National treatment requires no more, and the U.S.'s existing policy on aeronautical enroute services is consistent with that restriction. A policy that makes no distinction between foreign and domestic firms by definition meets the obligation.[24] Thus, even if the treaty did apply, the United States is in full compliance with its terms.

B. The Commission's Aeronautical Enroute Policies Are Necessitated by Frequency Management Requirements and Thus Are Exempted from the GBT Agreement

The GBT Agreement commits each of its 69 signatories to the market liberalization schedules set forth in their table of commitments and in any "additional commitments" that are included. Prompted by the United States and the European Union, 65 countries added additional commitments that address how they will regulate communications service providers.[25] Based on

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[24] Although, as demonstrated below, ARINC is not a monopoly, the WTO does not require countries to forego the exclusive service of this or any other activity, so long as it is consistent with that country's scheduled commitments: "Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments." Final Act, GATS, Art. VIII § 1.

[25] *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Order and Notice of Proposed Rulemaking, IB Docket No. 97-142, ¶ 28 (June 4, 1997); *see also* Final Act, GATS, Art. XVIII (authorizing WTO Members to negotiate additional commitments that are to be inscribed in the Members' schedules).

the Reference Paper, these additional obligations are attached to the scheduled commitments of these countries.

With respect to the allocation and use of the spectrum, Item 6 of the U.S. Reference Paper recognizes that open entry does not trump the laws of physics. Spectrum remains a limited resource. If all the frequencies allotted for a particular service are already licensed, the GBT does not obligate governments—when faced with request for new foreign entry—to find and allocate new spectrum. Nor does it necessitate the reduction of frequencies licensed to existing operators. Rather, the principles of the GBT require only that entities from WTO Member states (where such states have committed to market opening) receive fair access to any subsequent radio spectrum for basic telecommunications service in a competitively neutral manner.[26] The FCC today provides such access through ARINC.

Both the WTO and the FCC have recognized that applying the Agreement does not imply an absolute right to obtain spectrum in all Member states. Earlier this year, the Chairman of the Group on Basic Telecommunications issued a note stating his interpretation of the Group's final position on market access to the radio spectrum: "[U]nder the GATS *each Member has the right to exercise spectrum/frequency management, which may affect the number of service suppliers* . . . . Also, Members which have made additional commitment[s] in line with the Reference Paper on regulatory principles are bound by its [Item] 6."[27] More recently, in its *DISCO II* Further Notice of Proposed Rulemaking, the Commission concurred:

> [I]n a service for which U.S. [entities] have already been licensed, we would not expect to authorize a non-U.S. licensed [entity] to serve the United States if grant would create debilitating

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[26] "Any procedures for the allocation and use of scarce resources, *including frequencies*, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner," WTO, Group on Basic Telecommunications Agreement, United States Reference Paper, Item 6 (1997) (emphasis added) [hereinafter U.S. Reference Paper].

[27] WTO, *Report of the Group on Basic Telecommunications,* News Release, at 4 (Feb. 15, 1997) (emphasis added).

> interference problems or where the only technical solution would require the licensed systems to significantly alter their operations. *We believe that these kinds of spectrum management decisions are consistent with the WTO Basic Telecom Agreement.*[28]

Long ago, the Commission determined that there were insufficient frequencies and excessive demand to permit each aircraft operator or organization to construct its own network of aeronautical enroute ground stations.[29] More recently, the growth of aviation has led the FCC to reaffirm the importance of having ARINC as the single manager of the limited aeronautical spectrum.[30] The spectrum available in the U.S. for aeronautical enroute service has actually been

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[28] *Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States (Disco II)*, Further Notice of Proposed Rulemaking, IB Docket No. 96-111; CC Docket No. 93-23, ¶ 38 (July 18, 1997) (emphasis added).

[29] *See* FRC, 4th Ann. Rep. at 69-70 (1930). In 1937, the FCC held that:

> After careful consideration of the whole record in the light of the Communications Act, and the rules and regulations adopted pursuant thereto, the Commission finds that a rapid, efficient, dependable, coordinated system of communications is necessary at all times for the safety of operation of airplanes on the airways. . . . The public interest requires that the coordinating agency for the national air transport service be maintained as a distinct organization separated and protected from the domination of any individual transport interest or group of interests. In general [ARINC] is organized so as to accomplish this purpose.

ARINC v. AT&T, 4 F.C.C. 155, 163 (1937).

[30] In 1980, the FCC reviewed ARINC's management of the aeronautical spectrum and stated:

> The rule changes requested by Swift Aire (i.e., the elimination of the one station per location rule) would produce a number of negative effects. In that service must be provided to all qualified aircraft operators on the available enroute spectrum, efficiency would certainly suffer. Unfettered expansion of the number of licensees would reduce the usefulness of the industry data base, limit ARINC's ability to coordinate frequency assignments and increase congestion and interference. Flexibility in the planning and implementation of new techniques and configurations would be more difficult due to greater diversification of control. The vast majority of the users of enroute communications would be less

(Continued...)

reduced over the past forty years while aircraft operations have increased by several orders of magnitude. This limited spectrum must be shared by the 145 U.S. certificated air carriers and the 318 foreign airlines that are active in the United States today, which collectively carry over 500 million passengers and millions of tons of cargo every year, and by the numerous commuter airlines, air taxis, business aircraft, and general aviation users of the aeronautical enroute service. Thus, the Commission decided to license one entity per location, and ARINC has consistently made communications services available to all aircraft operators, without distinction between domestic and foreign airlines.[31]

The Commission is thus not obligated by the GBT Agreement to change its current means of regulating aeronautical services. Rather, the Commission is required by Item 6 only to use the spectrum in an "objective, timely, transparent and non-discriminatory manner."[32] The Commission has accomplished this through its existing system of frequency management for the aeronautical spectrum, by which ARINC acts on behalf of the entire aviation industry. The FCC has ensured that the aeronautical spectrum is available to support aircraft operations without regard to nationality. This is precisely what is contemplated by Item 6 in the Reference Paper. Accordingly, the FCC's policy is completely consistent with the U.S.'s GATS obligations.

(...Continued)

satisfied with what would soon be perceived as a less effective service.

Petition for Rulemaking to Amend Part 87, Memorandum Opinion and Order, RM-3113, ¶ 22 (Jan. 24, 1980) (footnote omitted) [hereinafter *Swift Aire*].

[31] The use of the aeronautical spectrum in the United States is governed by the Aeronautical Industry Operational VHF Policy. This frequency plan was prepared by the Aeronautical Frequency Committee ("AFC"), which consists of representatives from the civil aviation community, including representatives from general and business aviation.

[32] U.S. Reference Paper, Item 6.

III. THE FCC's POLICY OF LICENSING A SINGLE, INDUSTRY-OWNED COMPANY TO MANAGE THE LIMITED AERONAUTICAL ENROUTE FREQUENCIES HAS ALWAYS BEEN NON-DISCRIMINATORY, TRANSPARENT AND HAS PROMOTED THE OBJECTIVES OF FREE TRADE

The Commission's licensing policies as to the aeronautical enroute service foster the free trade objectives of the United States and the WTO. Although the spectrum availability for aeronautical operational control communications is limited, the lack of facilities has never been a barrier to a foreign air carrier wishing to operate into (or over) the United States or to a new U.S. air carrier. The FCC's policies as to the management of the aeronautical spectrum by the aviation industry through ARINC has been an unqualified success for almost seventy years.

The Commission has repeatedly recognized that the United States must have a single, designated aeronautical spectrum manager to ensure aircraft operational safety and to promote national security.[33] A single manager is necessary because, as the Commission has stated, an unrestricted number of aeronautical enroute stations per location "would result in a less efficient and effective enroute communications service."[34] In this regard, the Commission has stated that the "basic rationale for ARINC's formation is still valid today, i.e., a scarcity of available spectrum and a need for coordination among users to assure adequate enroute communications at reasonable costs."[35]

ARINC's role as an industry frequency manager does not mean that it is a monopoly as SITA argues.[36] ARINC responds promptly and efficiently to the requirements of domestic and foreign aircraft operators for service arrangements that meet the individual user's needs within the parameters of the Aeronautical Industry Operational VHF Policy and ARINC's obligations to retain licensee control over the facilities. Some of the station equipment is owned by ARINC; some is owned by the staffing organization and leased to ARINC. These different service

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[33] *See supra* notes 29-30.

[34] *Swift Aire*, ¶ 20.

[35] *Id.*

[36] SITA Comments, at 16-21.

arrangements compete with each other, leading to innovation and lower cost for the users. ARINC's role as the licensee does not limit options, but rather it ensures that the limited spectrum is used and shared efficiently and that the facilities are used for safety and regularity of flight.

SITA asserts that the United States is unique in this approach to frequency management.[37] However, there is no single approach to the assignment of these facilities. Each country must find its own method of managing spectrum, and the FCC's Rules for the aviation radio services have promoted competition. One reason that the United States takes a different approach to frequency assignment is the unique requirement imposed by the FAA for private radio communications between airline dispatch offices and aircraft in flight.[38] No other country imposes such a requirement on its airlines. Aeronautical frequency management in the United States is also uniquely complicated by the large number of domestic and foreign aircraft operators. ARINC performs the role of neutral arbiter among these many competitors for limited communications facilities.

Last, as the United States' aeronautical spectrum manager, ARINC has established international standards for air-ground communications engineering and frequency usage in conjunction with the Airline Electronic Engineering Committee and the International Civil Aviation Organization. These common standards have acted as catalysts to the industry's worldwide growth. They permit more carriers to enter the market more easily and, as a result, support competition in the airline industry.

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[37] SITA Comments, at 7. SITA asserts also that it is authorized to provide AIRCOM service in Canada. ARINC can find no evidence that such authorizations exist. Moreover, ARINC doubts that SITA has "aeronautical enroute service authorization in 141 countries and territories." *Id.* at 19 n.45.

[38] *See* 14 C.F.R. § 121.99. Voice communications remain an FAA requirement for U.S. airlines to operate. SITA apparently proposes to provide only data communications to the exclusion of voice service (SITA Comments, at 3 n.4), and would not fully meet the airlines' need for operational control communications.

IV. THE COMMISSION'S *AD HOC* REGULATION OF AERONAUTICAL SERVICES CONTINUES TO BE IN THE PUBLIC INTEREST

Two years ago, the Commission concluded that it had insufficient experience with foreign-based requests for aeronautical enroute and fixed licenses to determine what policy would service the public intent.[39] The aeronautical enroute service has essentially one licensee. Fewer than ten contested applications for this service have been set for hearing or reached a Commission decision, and none of these involved questions of foreign ownership. The FCC simply has no experience upon which it can base any presumption, and especially in light of the safety and national security aspects of this service, should continue its current *ad hoc* approach.

The public interest would be harmed, however, if the Commission makes an *a priori* decision on the issues presented in SITA's Comments. As the Commission noted in its *Foreign-affiliated Entities* order, it "has not had an opportunity to consider the implications of allowing foreign ownership above the 25 percent statutory benchmark in this context, and we are unwilling to establish a rule where we have no historical guidance."[40]

Nor has SITA offered any such guidance. SITA has not sustained any injury as a result of the Commission's *ad hoc* regulatory approach. No aircraft operator has requested that SITA's aeronautical facilities be available in the United States. SITA has never approached ARINC to determine if it could provide AIRCOM facilities in the United States. ARINC's. SITA's Comments are thus based on pure speculation.

Because the Commission still has no experience with respect to foreign ownership of aeronautical licenses, it should not make any presumptions regarding whether a market with more than one provider would be in the public interest. The Commission's very concrete experience with ARINC does suggests, however, that multiple aeronautical enroute licensees would be unable to address adequately the challenges of providing aeronautical services. These

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[39] *See Market Entry and Regulation of Foreign-affiliated Entities*, Report and Order, IB Docket No. 95-22, ¶ 196 (Nov. 30, 1995).

[40] *Id.*

challenges include the FCC's safety and national security concerns, the FAA's requirement that scheduled air carriers provide for operational control of their aircraft, and the limited nature of the available spectrum, as well as the need to coordinate frequencies in what is becoming an increasingly congested aeronautical service. The FCC's system for managing the aeronautical enroute spectrum has met these challenges for over 60 years, it has advanced aircraft carrier competition, and it has promoted the public's interest in safe air travel.

CONCLUSION

For the foregoing reasons, the Commission should continue its *ad hoc* approach to foreign ownership of aeronautical enroute licenses and retain the current aviation services rules.

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August 12, 1997

CERTIFICATE OF SERVICE

I, Phyllis Hall, hereby certify that on the 12th day of August 1997, I caused copies of the foregoing Reply Comments of Aeronautical Radio, Inc., to be sent via first-class mail to the following:

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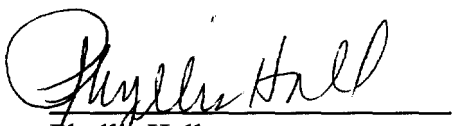

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